8. Hearing abducted children in Court – A comparative point of view from three countries (Belgium, France & the Netherlands)

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Introduction

This paper summarises the findings of a legal study conducted within the framework of the multidisciplinary research project "EWELL – Enhancing the Well-being of Children in Cases of International Child Abduction".[2] The legal study comprised two elements; a "quick scan" of national legislation on the child's right to be heard in 28 European Union (EU) countries, and an in-depth analysis of case law from Belgium, France and the Netherlands focussing on the hearing of children in child abduction cases under the Hague Child Abduction Convention and the Brussels IIa Regulation. The case law analysis is the predominant focus of this paper. Where relevant, examples from the "quick scan" will be provided to situate the findings within a wider European context.

After a brief overview of the research methodology, the paper addresses some of the key findings on how children are heard in abduction proceedings. The second part of the paper takes a closer look at two issues that particularly stroke our attention; the courts' assessment of objections to return and elements of the child's maturity. The paper concludes with a brief critical reflection.

Research methodology for the case law analysis

In the case law analysis, we examined court rulings on hearing children during legal proceedings following an international child abduction (as defined under the Hague Convention and the Brussels IIa Regulation). All cases were decided by family courts at first instance, regional or national Appeal courts and Supreme courts in Belgium, France and The Netherlands. The project was limited to the study of cases that had been decided between March 2005, when the Brussels IIa Regulation entered into force, and March 2016, the starting date of the EWELL-project. The study focussed on those cases where judicial officers explicitly referred to or made a determination on whether a child should be heard in return proceedings, irrespective of whether or not the hearing actually took place

The sample consisted of a total of 176 cases, subjected to various research questions in order to assess the way in which judges approach the hearing of abducted children and its implications, namely:

- What reasons form the basis of the judges' decision as to whether the child will be heard or not?
- Does the court provide any information on how the hearing took place?
- Does the court decision offer any insight into the personality and / or the behaviour of the child?
- Was the child's opinion decisive for the court's decision, and why?
- Is there a difference in approach between Hague cases and the Brussels II a Regulation cases when determining if a child should be heard?
- Are there any other matters relevant to understand a court's procedure on hearing children in cases of parental abduction?

The databases used to find the cases differed for each country. INCADAT was systematically consulted for all three jurisdictions. In the Netherlands, most cases were published on the website "*www.rechtspraak.nl*". Accessing Belgian and French case law however was more challenging, as many judgments are not published online or made publicly available elsewhere. As a consequence, the study also includes non-full-text references. In some cases, child abduction lawyers and judges were particularly helpful in providing anonymised, unpublished decisions. All the cases retrieved were analysed using Excel or NVivo, a software for qualitative data analysis.

The child's age and maturity in Belgium, France and the Netherlands

The number of cases in the sample where the judge referred to the hearing of the child, irrespective of whether the hearing actually took place, varied considerably between the three jurisdictions. For the Netherlands, there were 98 cases, for Belgium 25 and for France 53. For the Netherlands, children were allowed to be heard in 81 cases, or approximately 82% of cases where reference to the hearing of the child was made; children were heard in only 6 Belgian cases (24%) and in 24 of the French cases (45%). However, the number of cases in which the objections of the child were decisive in the order not to return the child (*i.e.*, application of Art. 13(2) of the 1980 Hague Child Abduction Convention) is relatively similar amongst the three jurisdictions, varying between 16% in the Netherlands (16 cases), 12% in Belgium (3 cases) and 11% in France (6 cases).

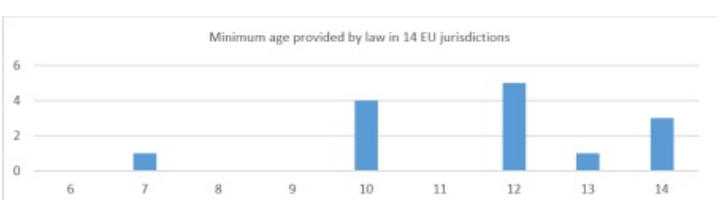
The main reason for the great disparity between the three jurisdictions in the number of cases where children are heard is the minimum age at which judges consider children capable of being heard in such proceedings. In the

Netherlands, children from 6 years onwards are given an opportunity to express their views. In Belgium, courts generally permit children 10 years or older to be heard. In France, our analysis found that children younger than 9 were not heard, with the exception of 6-8 year olds who had older siblings. As most children are abducted when they are young, the Dutch courts have a significantly higher number of cases where the child was heard.

The three jurisdictions are further distinguished by how their respective courts assess a child's maturity. Even though the assessment of maturity should be analysed on a case-by-case basis for every child, Belgian and French courts do not elaborate on the concept of maturity or "*discernement*" in their case law. Both jurisdictions generally refrain from a detailed assessment of the child's maturity and use biological age as a criterion to decide whether or not the child should be heard. Dutch judges, on the other hand, extensively discuss their views on the child's maturity in individual cases. The Dutch case law differentiates between several age categories: children below the age of 9 are usually considered immature. Although they are heard, their views are not decisive. Children who are 11 and beyond are considered mature enough and due weight can be given to their views. However, this does not necessarily imply that the court will follow the child's views. For example, when the child suffers from a loyalty conflict, he or she can be mature enough to be heard (in the sense of his / her 'capacity' to be heard), but his / her views will not be decisive for the outcome of the case.

Minimum ages at which children are heard in the rest of Europe

The results from the "quick scan" demonstrate that there is an obligation to hear children in all EU jurisdictions, subject to a variable minimum age. A total of 14 jurisdictions specify a minimum age for the possibility to hear a child in any legal proceedings (see the graph below), whereas the law of 15 jurisdictions does not stipulate a minimum age.



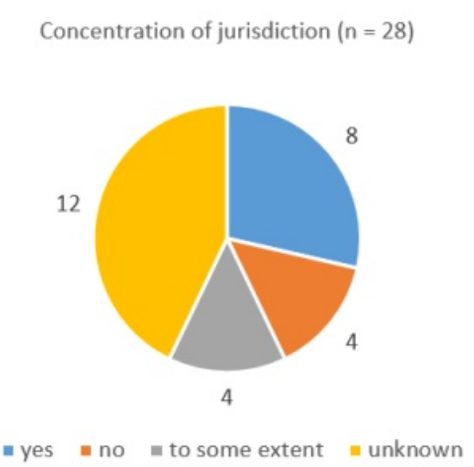
Note that the total number of jurisdictions is 29 instead of 28 – this is because England & Wales do not have minimum ages whereas Scotland does.

These figures relate to the hearing of children generally in legal proceedings. In abduction proceedings, the minimum age a child can be heard is sometimes lower. In the Netherlands, where children are in principle heard in legal proceedings from the age of 12, judges have allowed children to be heard at the age of 6 in abduction cases. In Belgium, children from 12 onwards are invited to be heard, but children aged 10 and 11 can be heard occasionally in abduction proceedings. French law, on the contrary, does not provide for a minimum age at which a child can be heard.

Concentration of jurisdiction

Another structural reason that may explain why Dutch courts are more familiar with hearing children is its concentration of jurisdiction. In the Netherlands, there is only one first instance court dealing with child abduction cases, which is based in The Hague. Accordingly, fewer judges deal with abduction cases, implying that they have gained experience and expertise on the subject matter. In Belgium, whilst there exists specialised family courts at first instance, there are 6 courts dealing with abduction cases in Antwerp, Brussels, Ghent, Liège and Eupen. In France, there is no concentration of jurisdiction at first instance level; any first instance courts can deal with child abduction cases. Whilst the data shows that concentration of jurisdiction might not have an influence on the number of cases where return is actually refused on the grounds of Art. 13(2) of the Hague Child Abduction Convention, judges in concentrated jurisdictions may feel less insecure or hesitant towards hearing children, because they do it much more often.

In the rest of Europe, of the 16 countries where this information was available, 8 countries concentrate jurisdiction, like in the Netherlands. 4 countries have found a middle ground (*e.g.*, Belgium), and in another 4 countries there is no concentration of jurisdiction at first instance level (*e.g.*, France).



A strict interpretation of the child's objections to return

Children's objection to return have been interpreted strictly in all three jurisdictions analysed in the study. The quantitative data also illustrates this; only between 11% and 16% of cases where children are heard was Article 13(2) of the Hague Child Abduction Convention applied. Such an assessment poses a huge dilemma for the judge. Whereas the views of the child is one of a variety of factors considered by the court in return proceedings, there are a number of instances in the case law where more weight was given to the child's objection.

For example, when an objection is explicit ("firm and consistent", conscious, sustained) (*Netherlands, Belgium, France*), it is more likely that judges will treat it as a serious ground for non-return. Objection has also justified non-return where the reasons for the objection are not limited to a preference for living in one country or the personality of one parent, but rather take into account the circumstances, the context and likely impact of return (*Netherlands, Belgium, France*). If the objection is confirmed in other sources at the court's disposal (*Netherlands, Belgium, France*), such as materials from the hearing of other parties, or documents from child welfare authorities, the child's views are also given more weight. Other reasons include when the objections relate to the child's healthy development (*Netherlands*); when the objection goes beyond a mere preference to keep the status quo (*Netherlands*); when the child takes initiative to stay in contact with the other parent (*Netherlands*); when the objection is not merely based on factual circumstances that make the country 'safer' or 'nicer' (like traffic, comfortable school etc.) (*Netherlands*); and when the child does not suffer from a loyalty conflict (*France*).

Whilst determining if a child should be heard and what weight should be given to the child's views is an extremely difficult and challenging task for judges, the case law has demonstrated that judges attempt to move beyond superficial or inconsistent objections and try to capture, as good as they can, what the long-term implications of a decision are for the child concerned.

Assessing children's maturity

The views of a child can be decisive to determine the outcome of the case when the court finds the child has reached sufficient age *and* maturity. Where determining at what age a child should be heard already poses considerable challenges to the courts, the assessment of maturity is even more controversial. Unlike Belgian and French courts, who do not elaborate on maturity or *discernement* in the case law at our disposal (with the exception of an occasional reference to authenticity), Dutch courts have made a concerted effort to elaborate their assessment of abducted children's maturity in their jurisprudence.

Analysing the available cases, we could compile an overview of the various conditions that Dutch courts take into account when assessing the child's maturity. Not all conditions must be satisfied for the child's views to be influential in the outcome of the proceedings, but the more a child's manner of speech and behaviour corresponded to the factors listed below, the more likely their views impacted the outcome of the case. The factors included:

- Ability to sufficiently oversee and understand the current situation as well as future consequences of a decision or preference on where to live (referenced in 16 cases);
- Ability to express one's wishes verbally (if needed assisted by an interpreter) and voice one's thoughts, feelings and emotions in a clear and comprehensive way (referenced in 10 cases);
- Ability to convey a certain degree of consistency in the story (referenced in 10 cases);
- Authenticity, self-reflexivity and independence corresponding to the child's age (referenced in 9 cases); or the ability to make independent decisions (referenced in 4 cases);
- Ability to speak in age-appropriate language (referenced in 4 cases), in his or her own words (referenced in 1 case) and with words through which the child can understand the implications (referenced in 1 case: the child spoke in terms of 'running away' or 'committing suicide', where the judge was of the impression that the child did not understand the implications of these actions);
- Ability to convey a sense of reality, thoroughness and/or detail in expressing his or her views (referenced in 4 cases);
- Ability to speak freely, openly and spontaneously (referenced in 3 cases);
- Ability to give reasons for a certain choice or preference (referenced in 3 cases);
- Ability to speak in a way that is not overly emotional (reference in 1 case where a strong expression of anger was considered a sign of insufficient maturity);
- Give an impression of maturity, *e.g.* seeming more mature than other children of the same age (referenced in 3 cases). It is worth noting the court explicitly states that maturity is *not* related to the extent to which a child feels responsible or 'pretends' to be older than he or she is (referenced in 1 case).

Whereas most elements to assess maturity are related to speaking abilities, behaviour is also considered (referenced in 5 cases), especially in cases involving younger children (5 to 7 years old) or children with a specific medical background (mental or behavioural problems). In one case, for example, the court pointed out that a 6-year-old child was uncomfortable when people spoke Spanish around him.

Intelligence (in the sense of schooling level) is rarely used to assess maturity (referenced in 1 case). Children who are shy, not particularly confident or persuasive in their speech and behaviour face more difficulty in convincing the court that they are sufficiently mature (referenced in 4 cases).

In one case involving a 13.5-year-old boy who made a significantly mature impression, the court explicitly stated that it is irrelevant whether the child speaks the full truth when reporting about the situation in his country of habitual residence if it is clear to the court that the way in which he *experiences* the situation is authentic and consistent. It follows that truth or objectivity are important only in cases of younger children, of a loyalty conflict, of undue influence by the parent or for any other reason that may raise doubts concerning the authenticity of the child's opinion, but are not so relevant when there is no doubt about the child's maturity.

Loyalty-conflicts or undue influence by one of the parents (usually the current caregiver, i.e. taking or retaining parent) are generally indications for the court not to follow the child's views (referenced in 5 cases). A loyalty-conflict is sometimes considered a sign of insufficient maturity (referenced in 8 cases). However, exceptions apply when the court can identify the child's independent ability to form an authentic opinion. Children who are under obvious social and emotional pressure can still be considered mature, even if their opinion is not decisive due to a loyalty-conflict. For example, a 15-year-old girl who had insisted she wanted to return to her other parent ever since she had been abducted, but changed her mind a few days before the hearing, was considered not insufficiently mature but subject to a loyalty-conflict. Further, the more the child portrays a situation in extreme terms, the less likely it is that a court will take his or her views into account.

Critical reflection

Elements of maturity are mainly linked to rational and verbal abilities, to speaking, to words and language. However, considering Article 12 of the UNCRC, capacity to form one's own views is not limited to rational competences, but also involves moral, emotional and social capacity. Policy makers, practitioners and academics have argued that as a minimum, children should not be assessed on the basis of indicators or conditions in which even most adults would fail to show sufficient understanding. This should make us particularly aware of the fact that children who are shy, lack self-confidence or are not as persuasive in their speech and behaviour, face more difficulty in convincing the court that they are sufficiently mature. Does that necessarily mean they are less able to assess their own lives and understand consequences of a decision? To that end, one may consider that assistance or guidance from other professionals could be required to explore and develop one's views, in accordance with the child's evolving capacities and context, always putting the burden of proof to assess maturity with the State, not with the child.

1 With the cooperation and support of Prof. Thalia Kruger, Prof. Wouter Vandenhole, Mrs. Hilde Demarré and Ms. Kim Van Hoorde.

2 Disclaimer: The findings in this paper are part of the EWELL research project on Enhancing the Well-being of Children in Cases of International Child Abduction. EWELL ran between January 2016 and December 2017, co-funded by the European Commission, with partners in Belgium, The Netherlands and France. The complete research report can be downloaded here, a summary is available here.

9. The hearing of the child in civil proceedings in Italy - Rules and practice

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The hearing of the child in civil proceedings in Italy has been effectively addressed through precise practical guidelines, beginning with the Protocol prepared by the Observatory on Civil Justice of Milano in 2006. The Protocol supplements Law n. 54 of 8.02.2006, which first introduced the possibility for the Judge to hear the child in separation and divorce procedures (Article 155 *sexies* of the Italian Civil Code).[1] Nonetheless, Art. 155 *sexies* did not provide any specific rule regarding the hearing.

Following amendments in 2012 and 2013,[2] the Italian Civil Code today expressly recognises the compulsory right of the child to be heard in any matter or procedure concerning him or her (Article 315 *bis*, comma 3). A series of rules are incorporated in the Code for the judicial hearing of the child in any proceeding where decisions affecting him or her are to be taken.[3] The rules contained in Law n. 54 since 2013 have been adopted and transposed following the Court's Protocols drawn throughout the country, starting with the first one in Milano.

The "Milano Protocol" was drafted between February and June 2016 by a working group of members of family law specialised associations, namely *Camera Minorile* and *AIAF (Associazione Italiana degli Avvocati per la famiglia e per i minori)*, with support from psychological and pedagogical experts. The Protocol was subsequently agreed to by the Family, Minor and Appeal Court.